OCBC Bank (M) Bhd v CTK Enterprise Sdn Bhd

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–600 OF 1999
PS GILL J
19 OCTOBER 1999

Civil Procedure *— Adjournment — Application for — Judicial discretion — Counsel engaged in hearing of case in magistrates' court — Whether adjournment should be granted*

Land Law *— Charge — Order for sale — Initial affidavit did not comply with O 83 r 3 of Rules of the High Court 1980 — Whether subsequent affidavit could be filed giving breakdown of amount owed by chargor*

Legal Profession *— Pupillage — Conduct of matters — Whether pupil had locus standi to conduct matters for firm other than firm his master is practising — Legal Profession Act 1976 s 36(2)*

The defendant charged its land to the plaintiff as security for a loan. Upon the defendant's default of the payment of the loan, the plaintiff sought for an order for sale of the defendant's land by public auction. The originating summons was supported by the affidavit of the plaintiff bank and a subsequent affidavit that gave a breakdown of the amount owed on the overdraft and term loan granted. The defendant's affidavit of reply consisted of a general denial of the amount owed. At the hearing of the application for order for sale, a pupil reading in the chambers of a firm that was not that of the defendant's solicitors appeared on behalf of the defendant and requested for an adjournment as the defendant's counsel was engaged in a matter in the Kuala Lumpur Magistrates' Court. The plaintiff objected to the adjournment and questioned the pupil's locus to appear on behalf of the defendant's counsel.

Held, allowing the plaintiff's claim and granting the order for sale:

(1) The pupil did not have locus to appear as s 36(2) of the Legal Profession Act 1976 made it clear that a pupil in chambers was strictly forbidden to appear on behalf of anyone but his master, or a firm, in which his master was practising (see pp 375G–376B).

(2) The granting of an adjournment was a matter which was made at the court's discretion and it should be exercised sparingly. It would be prudent for counsels who wished to seek adjournments to write in to court at least three days before the hearing to apply for a postponement and in the absence of any response from the courts, counsel must then assume that the application for postponement was not granted and to be ready for the hearing. On the facts, counsel having conduct of the case choose to give priority to a magistrates' court hearing as opposed to a High

Court hearing and did not make arrangements for someone else from his firm to not only appear but be ready to proceed on the matter (see p 376C–F).

(3) It is permissible for more than one affidavit to be filed in this type of case because invariably the matter could not be disposed of on the first return date. Provided evidence of the correct amount due has been put before the hearing date, the court had the power to dispense some omission to fulfill the rules to the letter, but only if no real prejudice would result to the defendant. The defendant's affidavit in reply which contained a general denial of the amount owing was not enough to raise a cause to the contrary. As the defendant denied the amount claimed, they had an onus to say how much they admitted owing. On the facts, the affidavit of the defendant did not condescend to such particulars (see pp 376I–377C).

[Bahasa Malaysia summary

Defendan telah menggadaikan tanahnya kepada plaintif sebagai jaminan suatu pinjaman. Apabila defendan gagal membuat pembayaran pinjaman, plaintif memohon satu perintah jualan tanah defendan dijalankan melalui lelongan awam. Saman pemula tersebut telah disokong oleh afidavit bank plaintif dan satu afidavit susulan yang memberikan pecahan jumlah yang perlu dibayar ke atas overdraf dan tempoh pinjaman yang diberikan. Afidavit jawapan defendan mengandungi satu penafian umum jumlah yang perlu dibayar. Di perbicaraan permohonan untuk perintah jualan, seorang pelatih (pupil) dalam kamar sebuah firma yang bukan merupakan peguamcara defendan telah hadir bagi pihak defendan dan memohon satu tangguhan kerana peguam defendan sedang mengendalikan satu kes di Mahkamah Majistret Kuala Lumpur. Plaintif membantah terhadap penangguhan tersebut dan menyoal locus pelatih tersebut untuk hadir bagi pihak peguam defendan.

Diputuskan, membenarkan tuntutan plaintif dan memberikan perintah jualan tersebut:

(1) Pelatih tersebut tidak mempunyai locus untuk hadir kerana s 36(2) Akta Profesyen Undang-Undang 1976 dengan jelas menyatakan bahawa seorang pelatih dalam kamar dihalang keras untuk hadir bagi pihak sesiapa kecuali master beliau, atau firma, di mana master beliau beramal (lihat ms 375G–376B).

(2) Pemberian satu penangguhan adalah satu perkara yang dibuat atas budi bicara mahkamah dan ia hendaklah digunakan sebaik-baiknya. Adalah wajar untuk peguam-peguam yang ingin memohon penangguhan untuk menulis kepada mahkamah sekurang-kurangnya tiga hari sebelum perbicaraan untuk memohon satu penangguhan dan dengan ketiadaan apa-apa

maklumbalas daripada pihak mahkamah, peguam mestilah menganggap bahawa permohonan untuk penangguhan tersebut tidak diberikan dan bersedia untuk perbicaraan. Berdasarkan fakta-fakta tersebut, peguam yang mengendalikan kes tersebut telah mengutamakan satu perbicaraan mahkamah majistret dan tidak membuat persediaan agar orang lain daripada firma beliau bukan sahaja hadir tetapi juga bersedia untuk meneruskan dengan kes tersebut(lihat ms 376C–F).

(3) Adalah dibenarkan untuk lebih daripada satu afidavit difailkan di dalam kes sebegini kerana selalunya kes ini tidak dapat diselesaikan pada tarikh pertama tersebut. Dengan syarat keterangan tentang jumlah sebenar yang perlu dibayar telah dikemukakan sebelum tarikh perbicaraan, mahkamah mempunyai kuasa untuk membiarkan beberapa peninggalan untuk memenuhi secara ketat peraturan-peraturan tersebut, tetapi hanya jika ia tidak mengakibatkan apa-apa prejudis sebenar ke atas defendan. Afidavit jawapan defendan yang mengandungi satu penafian umum tentang jumlah yang perlu dibayar tidak mencukupi untuk menimbulkan satu sebab yang bertentangan. Memandangkan defendan telah menafikan jumlah yang dituntut, mereka mempunyai tanggungjawab untuk mengatakan berapa banyak yang mereka mengaku perlu dibayar. Berdasarkan fakta-fakta tersebut, afidavit defendan tidak berkenan dengan butiran-butiran tersebut (lihat ms 376I–377C).]

Notes

For cases on application for adjournment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 131–136.

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

Cases referred to

Abdul Mutalib Dato' Seri Razak v The Malaysian Bar & Anor [1998] 2 CLJ 749 (refd)

Legislation referred to

Legal Profession Act 1976 s 36(2)
National Land Code 1965 Form 16D
Rule of High Court 1980 O 83 r 3(3)

Cheah Yoke Kuen (*Lim Seong Chun & Co*) for the plaintiff.
Pritam Singh chambering pupil appearing on behalf of the defendant.

PS Gill J: This is an application by OCBC Bank (M) Bhd ('the bank') for an order for sale of the defendant's land ('the land') to be sold by public auction.

The said land was charged to the bank on 4 July 1997, as security for the repayment to the bank of all monies due and liabilities owing to the bank by the defendant who was referred to in the charge as 'the chargor'.

Clause 3 of the annexure to the said charge reads in material particular as follows:

> The chargor will on demand repay and pay to the lender the indebtedness provided that no such demand for payment shall be made by the lender unless:
>
> (i) In accordance with the provisions of any of the security documents, the facility and all ...
>
> (ii) The chargor commits a breach of any of the covenants ...
>
> (iii) Any of the events specified in cl 7.1 shall occur; or
>
> (iv) Any other securities executed by the chargor or any security party or any other person or party pursuant to any of the security documents shall become enforceable.

On 2 April 1999, the solicitors for the plaintiff gave the defendant written notice of default, and required repayment of RM212,234.01, outstanding, as of 28 February 1999.

The letter was not complied with. On 13 May 1999, the solicitors served the defendant with the statutory notice in Form 16D of the National Land Code 1965 ('NLC'). It was served on the defendant, by way of AR Registered post, and was apparently acknowledged by the defendant.

On the appointed date of hearing of the originating summons, Mr Pritam Singh who appeared on behalf of the defendant requested an adjournment, in view of the fact that Mr Bachan Singh, counsel for the defendant, who had conduct of this matter was presently engaged in the Kuala Lumpur Magistrates' Court. Ms Cheah for the plaintiff vehemently objected to any request for an adjournment, and insisted that the matter proceed as scheduled. Ms Cheah then made a pert observation on the locus of Mr Pritam Singh, to appear on behalf of the firm of Bachan & Kartar as he was a pupil in the chambers in the firm of Sri Ling & Co. There was no evidence to suggest, that he had filed his papers for a change of chambers for pupillage at that point of time. In all fairness Ms Cheah did not ardently pursue this issue. Mr Pritam Singh made no attempt to clarify his position on this issue. On my part, one needs only to look at s 36(2) Legal Profession Act 1976 which reads as follows:

> A Judge may, upon application made in Chambers by a Master at the commencement of the pupillage of the Master's pupil, make an order *that the pupil be permitted to appear on behalf of the Master or of the firm in which the Master is practising* —
>
> (a) during the period of three months from the date of the order —
>
> (i) before a Judge or a Registrar of the High Court, in Chambers;
>
> (ii) before a President of the Sessions Court or a Magistrate, in Chambers;

(iii) before a Registrar of the Subordinate Courts, A

to mention a case, including entering judgment in default, or to apply for bail or to take a consent judgment or order; and

(b) at the expiration of the said period of three months in chambers in the High Court and in the Subordinate Courts and before any Magistrate, to conduct any cause or matter. (Emphasis added.) B

It would seem from a plain reading of the said section that a pupil in chambers is strictly forbidden to appear on behalf of anyone but his master, or a firm, in which his master is practising. I would exhort all lawyers who intend to take on pupils in chambers to abide strictly by this provision.

On the issue of adjournment, I must say with deep regret that there is a C growing tendency of counsels appearing in court, but not ready to proceed with the hearing of the case. It would seem that Mr Pritam Singh in this case appeared in court with the idea that he would get a postponement as a matter of right. It is most presumptuous to pre-empt the decision of the court. When a case is fixed for hearing the counsel who appears in court D must ensure that he is ready to proceed for hearing, even though the counsel intends to apply for a postponement, because granting of a postponement is at the discretion of the court. Granting of adjournments on the slightest pretext bedevils the administration of justice, and thus should be exercised only sparingly.

In exercising this discretion the court will consider the merits of the E application. The court will only grant a postponement if reasons given are satisfactory. In this instance I was informed that Mr Bachan Singh, the counsel having conduct of this matter was engaged in a magistrates' court case in Kuala Lumpur. It is beyond me that a counsel would choose to give priority to a magistrates' court hearing as opposed to a High Court hearing. F Even if the magistrates' court hearing was one of particular importance, it behoves on the counsel to make necessary arrangements for someone else from his firm to not only appear but be ready to proceed on the matter.

It would be prudent for counsels who wish to seek adjournments to write in to court at least three days before the hearing to apply for a G postponement. By doing so counsel may be able to know whether the application for postponement has been granted or not. If the court does not respond, counsel must then assume that the application for postponement is not granted and to be ready for the hearing, *Abdul Mutalib Dato' Seri Razak v The Malaysian Bar & Anor* [1998] 2 CLJ 749.

If an application for postponement is made at the outset of the hearing, H then counsel should proffer valid grounds for the postponement and also explain to the court why the court had not been informed of the application for adjournment before the date of hearing. Mr Pritam Singh had failed on all accounts to satisfy me as to why I should grant the adjournment. I thus disallowed his request for adjournment and proceeded to hear the matter. I

This originating summons was filed on 29 June 1999. The affidavit in support was deposed by the manager of the bank on 1 July 1999.

A close reference to O 83 of the Rule of High Court 1980 ('the RHC') will be pertinent in order to appreciate certain issues that I wish to elaborate on. In the initial affidavit filed by the plaintiff bank, I noticed that there was non-compliance, with the provisions of O 83 r 3(3) RHC. However in a subsequent affidavit filed on 14 October 1999, the plaintiff had given a breakdown of the amount owing on both the overdraft, and the term loan account, granted by the plaintiff to the defendant. This is quite permissible, as more than one affidavit can usually be filed in this type of case because invariably the matter cannot be disposed of on the first return date. Provided evidence of the correct amount due has been put before the hearing date, the court has the power to dispense some omission to fulfill the rules to the letter, but only if no real prejudice will thereby result to the defendant.

An affidavit in reply was filed by the defendant, on 2 August 1999, which in the main strikes me as being a general denial of the amount owing. It is trite law that a bare denial of a debt is never enough. The chargor (defendant) also has an onus if he denies the amount claimed to say how much he admits owing. Sadly the affidavit of the chargor/defendant does not condescend to such particulars. Thus there was to my mind 'no cause to the contrary' and I allowed the plaintiff's claim and granted an order for sale.

Plaintiff's claim allowed.

Reported by Chin En Tek